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Superintendant of Lands and Surveys, Miri Division & Anor v Abdul Samad bin Mohd Embong & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(NCvC)(A)-170–04 OF 2019
AZIZAH NAWAWI, VAZEER ALAM AND SEE MEE CHUN JJCA
3 APRIL 2023

C

Administrative Law — Judicial review — Certiorari — Respondents filed action against Superintendent of Lands and Surveys ('Superintendent') claiming native customary rights ('NCR') over land — Superintendent alienated land to third party for public purpose pending determination of respondents' NCR claim D *over land — Respondents filed judicial review application against Superintendents' decision to alienate land — Appeal against decision of judicial commissioner allowing judicial review application — Whether respondents had locus standi to file judicial review application — Whether respondent adversely affected by decision of Superintendent — Whether failure to make third party* E *whose rights were adversely affected by decision as party to judicial review application was fatal and contrary to principle of natural justice — Whether respondents must be given right to be heard before Superintendent alienate land to third party — Whether orders of judicial commissioner in contravention with principle of indefeasibility of title embodied in s 132 of the Sarawak Land Code* F *— Rules of Court 2012 O 53 r 2(4) — Sarawak Land Code ss 5(3)(b), (3)(c), (4), 15, 132 & 197*

The present appeal was filed by the appellants against the decision of the learned judicial commissioner ('the JC') in allowing the respondents' G application for judicial review to quash the decision of the Superintendent of Lands and Surveys, Miri Division ('the first appellant') to grant lease of state land on a piece of land known as Lot 1015 ('the said land') to a company known as SESCO Bhd ('SESCO'), a subsidiary of Sarawak Energy Bhd, pending the determination by the High Court of the respondents' claim H against the appellants for native customary right ('NCR') over the said land. Initially the said land was NCR land known as Lot 491, but the NCR was extinguished by the Ministry of Resources Planning and Environment via the Land (Native Customary Rights) (No 14) 2012 Direction ('2012 Direction') for public purpose pursuant to s 15 of Sarawak Land Code ('the SLC'). After I the extinguishment of NCR of the said land, Lot 491 was cancelled and replaced by Lot 1015, the subject of the judicial review application. In the present appeal, the appellants argued that: (a) the respondents did not have the locus standi to file the judicial review application because the respondents failed to satisfy O 53 r 2(4) of the Rules of Court 2012 ('the ROC'); (b) the JC

erred in law when he failed to appreciate that the failure of the respondents to make SESCO as a party in the judicial review application was fatal and contrary to the principle of natural justice; (c) the JC was plainly wrong in holding that the respondents must be given right to be heard before the first appellant made a decision to alienate the state land to SESCO for public purpose; and (d) the orders granted by the JC was legally untenable as it was against the established principle of indefeasibility of title embodied in s 132 of the SLC.

Held, allowing the appeal with costs and setting aside the decision of the learned JC:

(1) In the context of a judicial review application, locus standi referred to the right of an individual or group to bring a legal challenge against a decision or action of a public body or government entity. To have locus standi in a judicial review application, the applicant must demonstrate that they were adversely affected by the decision of the public authority. This meant that the applicant must show that they had a real and genuine interest in the decision or action being challenged, and that they would be directly affected by the outcome of the legal challenge (see paras 15–16).

(2) Based on the factual matrix of the appeal, the court was of the view that by the time the application for judicial review was filed, the respondents no longer had any NCR over the said land because their rights (if any) had been extinguished pursuant to the 2012 Direction. As such, the respondents had no locus standi to challenge the decision of the first appellant to alienate the said land to SESCO for a public purpose, as they were not adversely affected by the said decision, and neither could they be said to have any genuine and real interest in the subject matter ie, the alienation of state land to SESCO. In this regard, the learned JC had applied the wrong test and failed to apply the test in the case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 in order the ascertain the locus standi of the respondents. The fact that the respondents had filed the civil suit claiming their NCR did not clothe them with the necessary locus within the ambit of O 53 of the ROC (see paras 26–27, 30–31 & 33).

(3) Any party, whose rights would be adversely affected by the decision of the court, must be present before the court to protect its rights. The principle of natural justice required that all parties who would be affected by a decision have the opportunity to present their case and be heard by the court. This was known as the principle of *audi alteram partem*. In the present appeal, it was pertinent to note that the relief sought by the respondents in their application for judicial review was to quash the decision of the first appellant to alienate the said land to SESCO. If this

application was successful, it would defeat the title of SESCO, being the registered owner of the said land. Therefore, the learned JC had committed an appealable error in quashing the decision of the first appellant to alienate state land to SESCO, as the same was done without providing SESCO with the opportunity to be heard, thereby violating the principles of natural justice (see paras 36 & 41–42).

(4) The court agreed with the appellants that the learned JC was plainly wrong in his decision that the respondents must be given a right to be heard before the first appellant made a decision to alienate the said land to SESCO for public purposes. Since any NCR on the said land had been extinguished and the land had been reverted to the State Government, it was up to the State Government to alienate the land. Considering that the said land belonged to the State Government, there was no legal requirement for the respondents to be given a right of hearing prior to the alienation. This was simply because the respondents had no legal rights to the said land. Even if the respondents may have proven their NCR in a civil trial, their legal recourse was only to secure compensation pursuant to ss 5(3)(b), (c) and (4) or s 197 of the SLC (see para 46).

(5) The court agreed with the appellants that the orders granted by the learned JC was legally untenable as it was against the established principle of indefeasibility of title embodied in the s 132 of the SLC. In the present appeal, the registered proprietor of the said land was SESCO. Therefore, pursuant to s 132 of the SLC, SESCO had an indefeasible title to the said land. In the present case, SESCO became the registered owner of the said land even before the respondents could establish their NCR, which was eventually dismissed. In the absence of vitiating factors under s 132 of the SLC, SESCO's registered interest could not be defeated by the respondent's NCR claim. As such, the court found that the learned JC was plainly wrong as he had failed to consider the indefeasibility of SESCO's title to the said land. Further, the learned JC was plainly wrong when he failed to conclude that based on established authorities, the proper remedy for the infringement of NCR (if any) as a result of the alienation of the said land to SESCO was an award of damages and not a declaration to nullify the title issued to SESCO (see paras 47–48 & 57–58).

[Bahasa Malaysia summary

Rayuan semasa difailkan oleh perayu-perayu terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') yang membenarkan permohonan responden-responden untuk semakan kehakiman untuk membatalkan keputusan Penguasa Tanah dan Survei, Bahagian Miri ('perayu pertama') untuk memberikan pajakan tanah negeri di atas sebidang tanah yang dikenali sebagai Lot 1015 ('tanah tersebut') kepada sebuah syarikat yang dikenali sebagai SESCO Bhd ('SESCO'), anak syarikat Sarawak Energy Bhd, sementara

menunggu penentuan oleh Mahkamah Tinggi berhubung tuntutan responden-responden terhadap perayu-perayu untuk hak adat anak negeri ('HAAN') ke atas tanah tersebut. Pada mulanya tanah tersebut adalah tanah HAAN yang dikenali sebagai Lot 491, tetapi HAAN tersebut telah dipadamkan oleh Kementerian Perancangan Sumber dan Alam Sekitar melalui Land (Native Customary Rights) (No 14) 2012 Direction ('Arahan 2012') untuk tujuan awam menurut s 15 Kanun Tanah Sarawak ('KTS'). Selepas pemadaman HAAN tanah tersebut, Lot 491 telah dibatalkan dan digantikan dengan Lot 1015, subjek bagi permohonan semakan kehakiman tersebut. Dalam rayuan ini, perayu-perayu berhujah bahawa: (a) responden-responden tidak mempunyai locus standi untuk memfailkan permohonan semakan kehakiman kerana responden-responden gagal memenuhi A 53 k 2(4) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'); (b) PK terkhilaf dari segi undang-undang apabila beliau gagal memahami bahawa kegagalan responden-responden untuk memasukkan SESCO sebagai pihak dalam permohonan semakan kehakiman adalah memudaratkan dan bertentangan dengan prinsip keadilan semulajadi; (c) PK secara terang-terangan terkhilaf dalam berpendapat bahawa responden-responden perlu diberi hak untuk didengar sebelum perayu pertama membuat keputusan untuk memberikan hak milik tanah negeri kepada SESCO untuk tujuan awam; dan (d) perintah yang diberikan oleh PK tidak boleh dipertahankan di sisi undang-undang kerana ia bertentangan dengan prinsip ketidakbolehsangkalan hak milik yang ditetapkan yang terkandung dalam s 132 KTS.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan keputusan PK yang bijaksana:

(1) Dalam konteks permohonan semakan kehakiman, locus standi merujuk kepada hak individu atau kumpulan untuk membawa cabaran undang-undang terhadap keputusan atau tindakan badan awam atau entiti kerajaan. Untuk mempunyai locus standi dalam permohonan semakan kehakiman, pemohon perlu menunjukkan bahawa mereka telah terjejas oleh keputusan pihak berkuasa awam. Ini bermakna bahawa pemohon perlu menunjukkan bahawa mereka mempunyai kepentingan yang sebenar dan tulen dalam keputusan atau tindakan yang dicabar, dan bahawa mereka akan terjejas secara langsung oleh keputusan tindakan yang dicabar tersebut (lihat perenggan 15–16).

(2) Berdasarkan matriks fakta rayuan, mahkamah berpendapat bahawa pada masa permohonan semakan kehakiman difailkan, responden-responden tidak lagi mempunyai apa-apa HAAN ke atas tanah tersebut kerana hak mereka (jika ada) telah dipadamkan menurut Arahan 2012 tersebut. Oleh yang demikian, responden-responden tidak mempunyai locus standi untuk mencabar keputusan perayu pertama untuk memberi hak milik tanah tersebut kepada SESCO untuk tujuan awam, kerana mereka tidak terjejas dengan keputusan tersebut, dan mereka juga tidak boleh

dikatakan mempunyai apa-apa kepentingan yang tulen dan sebenar dalam perkara pokok iaitu pemberian hak milik tanah negeri kepada SESCO. Dalam hal ini, PK yang arif telah menggunakan ujian yang salah dan gagal menggunakan ujian dalam kes *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 untuk menentukan locus standi responden-responden. Fakta bahawa responden-responden telah memfailkan saman sivil untuk menuntut HAAN mereka tidak memberi mereka locus seperti yang dikehendaki oleh A 53 KKM 2012 (lihat perenggan 26–27, 30–31 & 33).

(3) Mana-mana pihak, yang haknya akan terjejas akibat keputusan mahkamah, perlu hadir di hadapan mahkamah untuk melindungi haknya. Prinsip keadilan semula jadi menghendaki semua pihak yang akan terjejas oleh sesuatu keputusan mempunyai peluang untuk membentangkan kes mereka dan didengar oleh mahkamah. Ini dikenali sebagai prinsip *audi alteram partem*. Dalam rayuan ini, adalah wajar untuk mengambil perhatian bahawa relif yang dimohon oleh responden-responden dalam permohonan mereka untuk semakan kehakiman adalah untuk membatalkan keputusan perayu pertama yang memberi hak milik tanah tersebut kepada SESCO. Sekiranya permohonan ini berjaya, ia akan menafikan hak milik SESCO, sebagai pemilik berdaftar tanah tersebut. Oleh itu, PK yang bijaksana telah melakukan kekhilafan yang boleh dirayu dalam membatalkan keputusan perayu pertama untuk memberikan tanah negeri kepada SESCO, kerana tindakan tersebut dilakukan tanpa memberikan SESCO peluang untuk didengar, dengan itu melanggar prinsip keadilan semula jadi (lihat perenggan 36 & 41–42).

(4) Mahkamah bersetuju dengan perayu-perayu bahawa PK yang bijaksana jelas salah dalam keputusannya bahawa responden-responden perlu diberi hak untuk didengar sebelum perayu pertama membuat keputusan untuk memberi hak milik tanah tersebut kepada SESCO untuk tujuan awam. Memandangkan mana-mana HAAN di atas tanah tersebut telah dipadamkan dan tanah tersebut telah dikembalikan kepada Kerajaan Negeri, maka terpulang kepada Kerajaan Negeri untuk memberi hak milik tanah tersebut. Memandangkan tanah tersebut adalah milik Kerajaan Negeri, tiada keperluan undang-undang untuk responden-responden diberikan hak pendengaran sebelum pemberian milikan tanah tersebut. Ini adalah semata-mata kerana responden-responden tidak mempunyai hak undang-undang ke atas tanah tersebut. Walaupun responden-responden mungkin telah membuktikan HAAN mereka dalam perbicaraan sivil, tindakan undang-undang mereka hanyalah untuk mendapatkan pampasan menurut ss 5(3)(b), (c) dan (4) atau s 197 KTS (lihat perenggan 46).

(5) Mahkamah bersetuju dengan perayu-perayu bahawa perintah yang

diberikan oleh PK yang bijaksana adalah tidak boleh dipertahankan di sisi undang-undang kerana ia bertentangan dengan prinsip ketidakbolehsangkalan hakmilik yang terkandung dalam s 132 KTS. Dalam rayuan ini, pemilik berdaftar tanah tersebut ialah SESCO. Oleh itu, menurut s 132 KTS, SESCO mempunyai hak milik yang tidak boleh disangkal ke atas tanah tersebut. Dalam kes ini, SESCO menjadi pemilik berdaftar tanah tersebut semenjak sebelum responden-responden boleh membuktikan HAAN mereka lagi, yang akhirnya ditolak. Dengan ketiadaan faktor penolakan di bawah s 132 KTS, kepentingan berdaftar SESCO tidak dapat dinafikan oleh tuntutan HAAN responden-responden. Oleh itu, mahkamah mendapati bahawa PK yang bijaksana jelas salah kerana beliau telah gagal mempertimbangkan ketidakbolehsangkalan hakmilik SESCO ke atas tanah tersebut. Selanjutnya, PK yang bijaksana nyata salah apabila beliau gagal membuat kesimpulan bahawa berdasarkan autoriti-autoriti yang telah ditetapkan, remedi yang sewajarnya bagi pelanggaran HAAN (jika ada) akibat pemberian hak milik tanah tersebut kepada SESCO adalah pemberian ganti rugi dan bukan pengisytiharan untuk membatalkan hak milik yang dikeluarkan kepada SESCO (lihat perenggan 47–48 & 57–58).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, FC (refd)

Bar Malaysia v Jabatan Pendaftaran Pertubuhan Malaysia [2018] 11 MLJ 121; [2017] 1 LNS 1412, HC (refd)

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2022] 2 MLJ 273; [2022] 3 CLJ 1, FC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766; [2014] 9 CLJ 733, FC (refd)

Jalang ak Paran & Anor v Government of the State of Sarawak & Anor [2011] 3 MLJ 13; [2011] 3 CLJ 469, CA (refd)

Majumder v Attorney-General of Sarawak [1967] 1 MLJ 101; [1966] 1 LNS 97, FC (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145; [2014] 2 CLJ 525, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1996] 1 MLRA 725; [1997] 1 AMR 433, FC (refd)

Sekar a/l Kandasamy (Pengerusi Kuil Seri Mangalanayagi Amman) v Lembaga Wakaf Hindu Pulau Pinang & Ors [2022] MLJU 2197; [2022] 1 LNS 2111; [2022] 7 AMR 425; [2022] AMEJ 1326, CA (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364; [1991] 1 CLJ Rep 419, SC (refd)
TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77; [2018] 1 CLJ 19, FC (folld)

Legislation referred to

Land Code (Cap 81) ss 5(3) (3)(a), (3)(b), (3)(c), (4), (7), 15, 132, 132(1), 197, 212
Rules of Court 2012 O 53, O 53 r 2(4)
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 53

Appeal from: *Abdul Samad bin Mohd Embong & Ors v Superintendent of Land and Survey & Anor* [2019] MLJU 2180 (High Court, Miri)

Mohd Adzrul bin Adzlan (with Voon Yan Sin) (Sarawak State Attorney-General's Chambers) for the appellants.
Berrylin Ng Phuay Lee (with Dominique Ng Kim Ho and Cherishe Ng Phuay Lee) (Dominique Ng & Assoc) for the respondents.

Azizah Nawawi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner ('JC') delivered at the High Court of Sabah and Sarawak at Miri on 11 March 2019. The learned JC had allowed the respondents' application for judicial review dated 8 November 2018 and had, inter alia, quashed the decision of the first appellant, the Superintendent of Land and Survey ('Superintendent'), to grant a lease of state land on Lot 1015 Block 8 Miri Concession Land District to Sykt SESCO Bhd ('SESCO'). SESCO is a subsidiary of Sarawak Energy Bhd.

[2] Having heard the appeal and considered the submissions of the parties, this court had allowed the appeal and set aside the decision of the learned JC.

SALIENT FACTS

[3] On 9 April 2012, the Ministry of Resources Planning and Environment had extinguished any native customary rights ('NCR') over Lot 491 Block 8 Miri Concession Land District via the Land (Native Customary Rights) (No 14) 2012 Direction ('2012 Direction').

[4] The 2012 Direction came into force on 27 April 2012 and, inter alia, reads as follows:

3. As the aforesaid land is required by the Government, the Government has to acquire it. In consequence thereof, all native customary rights over such land shall be taken over by the Government subject to payment of compensation under section 5(3) of the Land Code.

4. As from the date of coming into force of this Direction, all native customary rights over the said land shall cease to subsist and the said land shall revert to the Government for the aforesaid purpose.

5. Any person having any lawful claim to native customary rights over the said land or any part thereof and whose rights are affected by this Direction shall within sixty (60) days from the date of publication of this Direction in a newspaper circulated in Sarawak, submit his claim, together with evidence in support thereof, to the Superintendent, Land and Survey Department, Miri Division, Miri in a form prescribed by the Superintendent and obtainable from his office in the said Department. Compensation will be paid to those claimants with proven native customary rights over the said land or any part thereof in accordance with the provisions of the Land Code.

[5] The extinguishment of the NCR over Lot 491 Block 8 was for a public purpose, namely for the Extension of Miri Town 33/11KV Substation pursuant to s 15 of the Sarawak Land Code.

[6] Lot 491 Block 8 Miri Concession Land District was then cancelled and replaced by Lot 1015 Block 8 Miri Concession Land District ('the said lot') following Misc Job No 209/2014 vide L.14933/2014 dated 18 February 2014.

[7] In May 2014, the respondents instituted a civil suit, *Abdul Samad bin Mohd Embong & 2 Ors v Pantai Bayu Indah Sdn Bhd & 2 Ors* (Suit No MYY-21NCvC-5/6 of 2014) ('civil suit') against the appellants to claim their NCR over a parcel of land, encompassing Lot 1015 Block 8 Miri Concession Land District, the subject matter of the judicial review proceedings and this appeal.

[8] On 4 July 2018, whilst the civil suit was still ongoing, the appellants had alienated the said lot to SESCO. Exhibit 'MA1' is the print out of the title of the said lot, and the registered proprietor of the said lot is SESCO.

[9] The respondents, being dissatisfied with the alienation of the said lot to SESCO, commenced this application for judicial review on 8 November 2018. In the said judicial review application, the respondents were only seeking the following prayer:

That an Order of Certiorari be issued to set aside and/or to quash the decision of the Superintendent of Land and Survey made pursuant to Section 15 of Sarawak Land Code (Cap 81) in July 2018 and which decision was made known to the Applicants only on August 2018, which gave lease(s) of state land/titles on Lot 1015 Block 8

A

> Miri Concession Land District to Sarawak Energy Berhad [the said Lot] even before the determination of the dispute of Suit No MYY-21NCvC-5/6–2014 at the High Court and at the Court of Appeal, and for which the Applicants are claiming NCR over an area which includes the said Lot.

B

[10] On 11 March 2019, the learned JC had allowed the respondents' application and had quashed the decision of the Superintendent of Land and Survey to grant a lease of the said lot to SESCO.

DECISION OF THE HIGH COURT

C

[11] The learned JC took the position that the Superintendent's action in issuing the title of the said lot to SESCO, whilst an action involving the NCR over the said lot is still pending in the civil suit, would adversely affect the respondents.

D

[12] The learned JC then held that the Superintendent had granted a title to SESCO without providing the respondents with a chance to present their claims, despite being fully aware that the status of their claim for NCR over the said lot was awaiting a court determination in the civil suit. This deprived the respondents of natural justice, for not allowing the respondents to be heard before issuing a full title to SESCO.

E

[13] The learned JC concluded that the administrative exercise by the Superintendent exhibited procedural impropriety and must therefore be quashed.

F

OUR DECISION

G

Whether the respondents have any locus standi

[14] The appellants had challenged the locus standi of the respondents to file this judicial review application to quash the decision of the Superintendent to alienate the state land to SESCO on the basis that the respondents have failed to satisfy O 53 r 2(4) of the Rules of Court 2012, which reads:

H

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

I

[15] It is common ground that locus standi refers to a person's right to bring a legal action or challenge in court. In the context of a judicial review application, locus standi refers to the right of an individual or group to bring a legal challenge against a decision or action of a public body or government entity.

[16] To have locus standi in a judicial review application, the applicant must demonstrate that they are adversely affected by the decision of the public authority. This means that the applicant must show that they have a real and genuine interest in the decision or action being challenged, and that they would be directly affected by the outcome of the legal challenge (see *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525 ('MTUC') (FC)).

[17] In the context of this appeal, in order to ascertain if the respondents have requisite locus standi, we will have to consider various factors, including the nature of the decision being challenged, the relationship between the respondents and the decision, and the impact of the outcome of the legal challenge on the respondents.

Nature of decision being challenged

[18] In the present appeal, the respondents are seeking to quash the decision of the Superintendent to alienate state land to SESCO. The respondents are contending that they have been adversely affected by the Superintendent's decision because their NCR claim over the said lot is pending in the civil court.

[19] In the first place, the respondents' NCR (if any) over the said lot had been extinguished pursuant to the 2012 Direction dated 9 April 2012. It is pertinent to note that the respondents did not challenge the 2012 Direction by way of judicial review. In *Jalang ak Paran & Anor v Government of the State of Sarawak & Anor* [2011] 3 MLJ 13; [2011] 3 CLJ 469, the court held that the extinguishment of the plaintiff's native customary rights was executed by the Minister through the exercise of his powers as conferred by the Sarawak Land Code and hence was in the realm of public law. Any challenge thereto must be pursued through the procedure as laid down by O 53 of the Rules of the High Court 1980.

[20] Therefore, unless quashed or declared invalid, the 2012 Direction is valid and remains in force. Accordingly, the respondents' NCR (if any) had been extinguished on 27 April 2012. Upon such extinguishment, the said lot reverts to the Government pursuant to sub-s 5(3)(a) of the Sarawak Land Code. Section 5(3)(a) provides that any NCR may be extinguished by direction issued by the Minister, and on the date specified in the direction, the NCR shall be extinguished and the land held under such rights shall revert to the Government. Consequently, the respondents, who are claiming NCR over the said lot, are only entitled to claim for compensation as provided under ss 5(3)(b), (c) and (4) or 197 of the Sarawak Land Code.

[21] In *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin*

A *Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766; [2014] 9 CLJ 733 the Federal Court held that upon extinguishment of NCR, the rights of the parties are only with regard to compensation:

> [26] ... The plaintiff was right in contending that the alienation of the land to SEDC was unlawful as no compensation was paid by the Government under s 15 of the Land Code ... We are of the view that upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the Government under s 197 of the Land Code accrued ...

[22] The above case of *Husli bin Mok* was reaffirmed by the Federal Court in the case of *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273; [2022] 3 CLJ 1 where His Lordship, Abang Iskandar CJ (Sabah and Sarawak) held that:

> [135] After due deliberation of all the relevant provisions in the SLC, and having concluded that NCR is not a factor qualifying indefeasibility of title, *any native who is deprived of his NCR by reason of alienation may find the remedy in s 197 of the SLC*, which provides as follows:
>
> > Any person who is deprived of any land or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.
>
> [136] This is what the Federal Court had decided in *Husli* that *'upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the Government under s 197 of the Land Code accrued'.* (Emphasis added.)

Relationship between respondents and the decision

[23] The next issue is to ascertain the nexus between the respondents and the decision being challenged. We are of the considered opinion that there is no nexus between respondents and the decision of the Superintendent to alienate the said lot to SESCO, as the said lot is state land.

[24] With the extinguishment of any NCR over the said lot pursuant to the 2012 Direction, no person, including the respondents herein, have any NCR interest over the said lot. In fact, sub-s 5(7) of the Sarawak Land Code provides a legal presumption that state land is free from any native customary right until proven to the contrary. Subsection 5(7) reads:

> Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights.

Impact of the decision and the outcome of the legal challenge on the respondents

[25] We are of the considered opinion that the decision of the Superintendent to alienate the said lot to SESCO has no potential impact on the respondents as the Superintendent is statutorily empowered to alienate state land to SESCO. In any event, even if the application is allowed and the alienation to SESCO is quashed, it simply means that the said lot reverts to the Government.

[26] Therefore, in the factual matrix of this appeal, we are of the considered opinion that by the time this application for judicial review was filed on 8 November 2018, the respondents no longer have any NCR over the said lot because their rights (if any) had been extinguished pursuant to the 2012 Direction. Their rights, if any, is to seek compensation upon establishing their NCR claim over the said lot, and this forms part of their civil suit against the appellants.

[27] As such, we are of the considered opinion that the respondents have no locus to challenge the decision of the Superintendent to alienate the said lot to SESCO for a public purpose, as they are not adversely affected by the said decision, and neither can they be said to have any genuine and real interest in the subject matter, the alienation of state land to SESCO (see *MTUC* case).

[28] However, when the issue of locus was raised before the learned JC, the learned JC ruled in para 12 of his grounds of decision as follows:

> [12] Having considered submissions of learned counsel herein and having regard the pertinent affidavits, this court was of the view that the first respondent's action in issuing the aforesaid titles to SEB while an action involving the said lot still pending in Suit No MYY-21NCvC-5/6–10 of 2014 then would adversely affect the applicants.

[29] The learned JC simply held that because there was a pending civil suit, the respondent had the necessary locus standi to initiate the judicial review application. The learned JC had failed to explain in what manner was the respondents adversely affected by the alienation of the said lot (which was state land) to SESCO.

[30] We are of the considered opinion that the learned JC had applied the wrong test in order to ascertain if the respondents have any locus to challenge the Superintendent's decision to alienate the said lot to SESCO for public

purpose. The learned JC had clearly failed to apply the test in *MTUC*'s case, and to ascertain whether the respondents have a real and genuine interest in the subject matter, the decision to alienate state land to SESCO for public purposes.

[31] The fact that the respondents have filed the civil suit claiming for their NCR does not clothe them with the necessary locus within the ambit of O 53 of the ROC 2012. The statutory provisions in the Sarawak Land Code are clear, that once the 2012 Direction was issued, all NCR over the said lot have been extinguished and the land reverts to the state. Their only right (if any) is to secure compensation from the State Government, upon the establishment of their NCR.

[32] In any event, learned legal officer for the appellants had informed this court that the civil suit had been dismissed by the High Court as the respondents have failed to prove their NCR.

[33] For the aforesaid reasons, we find that the respondents have failed to meet the threshold locus standi test as they do not have any real and genuine interest in the subject matter of the dispute, the decision of the Superintendent to re-alienate the state land to SESCO for public purpose.

SESCO was not made a party

[34] Legal officer for the appellants submitted that the learned JC had erred in law when he failed to appreciate that the failure of the respondents to make SESCO as a party in the judicial review application is fatal and goes against the principle of natural justice.

[35] On this issue the learned JC held that since SESCO had taken an action against the respondents in another action, then '... SEB (SESCO) had exercised its rights and therefore it (SEB) was not prejudiced when the applicants had not included SEB in this action'.

[36] We are of the considered opinion that any party, whose rights would be adversely affected by the decision of the court, must be present before the court to protect its rights. The principle of natural justice requires that all parties who would be affected by a decision have the opportunity to present their case and be heard by the court. This is known as the principle of *audi alteram partem*.

[37] The Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364; [1991] 1 CLJ Rep 419 (SC) addressed this principle of natural justice in the following words:

> ... Natural justice is a concept which involves common law rules, namely, *(a) the right to be heard (audi alteram partem): the principle that a decision-maker must afford an opportunity to be heard to a person whose interests will be adversely affected by the decision,* and (b) the rule against bias (*nemo debet esse judex in propria sua causa*): the principle that a decision-maker must be disinterested or unbiased in the matter to be decided.

[38] In *Bar Malaysia v Jabatan Pendaftaran Pertubuhan Malaysia* [2018] 11 MLJ 121; [2017] 1 LNS 1412, prayer 2(a) and (b) of the review application are for an order of mandamus directing the Registrar of Society to revoke Persatuan Guaman Malaysia ('PGM') or Law Society of Malaysia's ('LSM') registration as a society, whilst prayer 3 is for declaratory orders that LSM/PGM is an unlawful society, that its registration is unlawful, null and void. The said prayers are seeking orders to be made against LSM/PGM, who is not a party to the judicial review application. In dismissing the said specific prayers against LSM/PGM in their absence, the High Court held as follows:

> [38] In the present application, the applicant did not make LSM/PGM a party in this judicial review application, yet the applicant is seeking to have LSM/PGM deregistered and/or declared as an unlawful society and/or declared as null and void. Therefore, *to allow leave in respect of the said prayers and to have the same proceed to substantive hearing would cause injustice to LSM/PGM as they would have been denied a right to be heard before they are deregistered or nullified.* (Emphasis added.)

[39] In *Majumder v Attorney-General of Sarawak* [1967] 1 MLJ 101; [1966] 1 LNS 97, the Federal Court held that declaration should not be made concerning persons interested but not joined as parties, as the declaration sought affected the rights of concerned parties, who are not before the court:

> The *courts should not make declarations which concern persons interested but not joined as parties* (*London Passenger Transport Board v Moscrop* [1942] AC 332 and *Threw v Attorney General* [1936] 2 All ER 1325). (Emphasis added.)

[40] The same principle was applied by this court in *Sekar a/l Kandasamy (Pengerusi Kuil Seri Mangalanayagi Amman) v Lembaga Wakaf Hindu Pulau Pinang & Ors* [2022] MLJU 2197; [2022] 1 LNS 2111; [2022] 7 AMR 425; [2022] AMEJ 1326 where declaratory orders were being sought pursuant to an originating summons, the effect of which was that the decision of the Head of State of Pulau Pinang (Tuan Yang Terutama — 'TYT') would be impugned. However, the Penang State Government which represents the TYT was not named as a party to the originating summons. The court held as follows:

> [15] It is clear from the prayers sought in OS13 that the plaintiff is seeking to impugn the deregistration of the Society by the third respondent and the TYT's decision vis a vis the takeover of the Temple by the first respondent. In pith and substance, the prayers sought in OS13 are targeted at the validity of the

deregistration of the Society via the third respondent's decision dated 7 August 2019, and the first respondent's takeover of the administration and management of the Temple per the TYT's decision dated 19 December 2019.

[16] In so far as the latter decision is concerned, the decision maker, ie, the TYT is not before the court. The JC opined that the State Government of Penang ought to have been named as a party, as the TYT acts under the advice of the State Executive Council ie, Governor in Council — (s 4 of the 1906 Ordinance). We agree with the JC's ruling in this regard. *It is trite that declarations may not be made against parties who are not before the court.* As it stands, the prayers sought in the OS vis a vis the decision of the TYT offend the principle that was established by the House of Lords in the seminal case of *London Passenger Transport Board v Moscrop* [1942] AC 332; [1942] 1 All ER 97 (HL) ('Moscrop') (per Viscount Maugham) *that declarations ought not to be granted against parties who are not before the ourt and who may be affected by the order.* (Emphasis added.)

[41] In the present appeal, it is not in dispute that the said lot had been alienated to SESCO. It is pertinent to note that the relief sought by the respondents in their application for judicial review was to quash the decision of the Superintendent to alienate the said lot to SESCO. If this application was successful, it would defeat the title of SESCO, being the registered owner of the said lot.

[42] Therefore, we are of the considered opinion that the learned JC had committed an appealable error in quashing the decision of the Superintendent to alienate state land to SESCO, as the same was done without providing SESCO with the opportunity to be heard, thereby violating the principles of natural justice.

Procedural impropriety

[43] The learned judicial commissioner had quashed the decision of the Superintendent to alienate the said lot to SESCO, on the ground that there was procedural impropriety in the following manner:

(a) since the Superintendent had issued titles to SESCO without giving the respondents the opportunity to lodge their claims when they are fully aware of the fact that the status of said land is pending the determination by the court, had deprived the respondents natural justice of right to be heard before making the decision to issue full titles to SESCO (see para 13 of the grounds of judgment);

(b) the Superintendent's issuance of the title to SESCO had failed to give the respondents an opportunity to lodge their claims over the lot in question as required under Sarawak Land Code, in particular, s 212 of the same (see para 17 of the grounds of judgment); and

(c) that no time was accorded to the respondents to respond before the decision was made by the Superintendent. Therefore, there was a clear breach of natural justice and procedural fairness, resulting in procedural impropriety (see para 17 of the grounds of judgment).

[44] Our apex courts have accepted the test in a judicial review application that had been set out by the House of Lords in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374, where Lord Diplock had this to say on pp 410–411:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground l would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ...
>
> By 'illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...
>
> I have described the third head as 'procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

(See *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337; and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1996] 1 MLRA 725; [1997] 1 AMR 433.)

[45] The learned JC had used the term 'breach of natural justice', 'procedural impropriety' and 'procedural fairness' interchangeably to emphasise the fact that the respondents have not been given a right to be heard before the Superintendent alienate the said lot to SESCO. This right to be heard is premised on the fact that there was a civil suit pending when the Superintendent made the decision to alienate the said lot to SECO.

[46] We are of the considered opinion, and we agree with the appellants that the learned JC is plainly wrong in his decision that the respondents must be given a right to be heard before the Superintendent made a decision to alienate the state land, the said lot to SESCO for public purposes. Our reasons are as follows:

(a) since any NCR on the said lot had been extinguished pursuant to the 2012 Direction, the said lot reverts to the State Government. Since the 2012 Direction had not been challenged, it is valid and remain in force. Thereafter, it is up to the State Government to alienate the said lot to SESCO for public purposes. Since the said lot belonged to the State Government, there is no legal requirement for the respondents to be given a right of hearing prior to the alienation. This is simply because the respondents have no legal rights to the said lot; and

(b) even if the respondents may have proven their NCR in a civil trial, their legal recourse is only to secure compensation pursuant to under ss 5(3)(b), (c) and (4) or 197 of the Sarawak Land Code. In fact, the 2012 Direction stipulates that any parties aggrieved by the extinguishment of their NCR may submit their claims for compensation within 60 days.

Indefeasibility of title

[47] We are of the considered opinion and we agree with the appellants that the orders granted by the learned JC is legally untenable as it is against the established principle of indefeasibility of title embodied in the s 132 of the Sarawak Land Code, which reads as follows:

> 132 Indefeasibility of title
>
> (1) Subject to this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest excep ...

[48] In the present appeal, the registered proprietor of the said lot is SESCO. Therefore, pursuant to s 132 of the Sarawak Land Code, SESCO has an indefeasible title to the said lot. In *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77; [2018] 1 CLJ 19, the Federal Court held as follows:

> [28] It can be seen that although s 132 of the Sarawak Land Code is not similarly worded as s 340 of the National Land Code ('the NLC'), the net legal effect of the indefeasibility accorded to s 340 of the NLC may admit to the same construction as s 132 of the Sarawak Land Code. *In the absence of fraud, upon registration of a charge, the party in whose favour the registration has been effected will obtain an indefeasible title to/or interest in the land*. This is a given.

[29] However, an important point to consider in this instant case is that no fraud was ever pleaded in the plaintiffs' amended statement of claim. Further, the plaintiffs did not produce any evidence in the High Court to prove the existence of fraud. The question now is whether the title of the first, second defendants and the interveners were indefeasible.

[32] We agree that titles should not be issued over land encumbered with NCR unless they have been extinguished; but with respect, we hold the view that, *once the titles are issued, indefeasibility of title sets in* (*Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383). In the present case, it is an undisputed fact that the provisional leases were issued in 1996. By the time this action was commenced in November 1998, the first and second defendants had already entered the land (1997) and cleared it for cultivation.

[33] The disputed lands being registered entities accorded protection to the interested parties under the aegis of indefeasibility. The orders made by the trial judge to nullify the provisional leases or to exclude areas claimed by the plaintiff as their NCR, where no fraud had been alleged against the registered owners of the land under the provisional leases or the registered charge thereof, thus, would be contrary to the doctrine of indefeasibility of title embodied under s 132(1) of the Sarawak Land Code. As correctly pointed out by the High Court in *Nikodemus Singai*, once the title is issued, the doctrine of 'indefeasibility of title' sets in unless the registered interest in the land had been procured by fraud.

[49] In the present appeal, fraud is not a pleaded issue against the alienation of the said lot to SESCO. Thus, based on the above case of *TR Nyutan*, we are of the considered opinion that the learned JC's decision to quash decision of the Superintendent has effectively nullified SESCO's title to the said lot. This is contrary to the doctrine of indefeasibility of title embodied in s 132(1) of the Sarawak Land Code.

[50] The respondents, however took the position that the NCR over the said lot was not properly extinguished on the following grounds:

(a) there was no *gazette* notification issued to extinguish Lot 956 pursuant to s 5(3) of the Sarawak Land Code, but Lot 956 was compensated under s 5(3) and (4) of the Sarawak Land Code with reference to the *Gazette* Notification for the Land (Native Customary Rights) (No 14) 2012 Direction which did not expressly extinguish NCR on Lot 956; and

(b) *gazette* notification issued to extinguish Lot 491 under s 5(3) and (4) of the Sarawak Land Code, but no compensations made for Lot 491 under the proviso to s 5(3).

[51] It is therefore the submission of the respondents that the extinguishment exercises for both Lot 491 and Lot 956 are irregular and incomplete and therefore bad in law. And as NCR cannot be extinguished

without due process to the law, any alienation or issuance of lease to SESCO would be ultra vires the law and done via a void or insufficient instrument.

[52] We are of the considered opinion that any NCR over said lot was clearly extinguished under the 2012 Direction. Added to that, since the 2012 Direction was not challenged in court, it remains valid and subsisting.

[53] Added to that, even if the NCR was not properly extinguished, we agree with the appellants that the alienation of the said lot to SESCO is still protected by the doctrine of indefeasibility of title as enunciated by the Federal Court in *TR Nyutan*.

[54] In *TR Nyutan*, the plaintiffs claimed that 'the intrusion of their native customary land was unlawful and without their consent, or without their NCR being first extinguished or without the payment of any compensation to them'. The plaintiffs went on to argue that 'indefeasibility of title cannot apply to defeat a claim for NCR unless there is clear evidence from the Superintendent of Land and Surveys that no NCR existed on the alienated land, that such rights have been surrendered or extinguished according to the provisions of the Sarawak Land Code'.

[55] Such an argument was rejected by the Federal Court and the Federal Court held that 'once the title is issued, the doctrine of 'indefeasibility of title' sets in unless the registered interest in the land had been procured by fraud'.

[56] The case of *TR Nyutan* was subsequently reaffirmed by the Federal Court in *Busing ak Jali* where His Lordship, Abang Iskandar CJ (Sabah and Sarawak) held that:

> [124] *While NCR is statutorily acknowledged, does it mean that it is the policy of the SLC or the intent of the Legislature to regard it as a factor qualifying indefeasibility*, as envisaged by that phrase posturing itself as the opening salvo in s 132(1) of the SLC? With respect, in the absence of a clear and unambiguous express provision to that effect, *we are not ready to conclude that the NCR, in the scheme of the SLC makes a qualifying factor to indefeasibility of title. As it stands now, fraud is the only stated factor,* if pleaded and established by the party who asserts it, that could render a registered title defeasible. *Even a failure to comply with s 15 of the SLC on extinguishment prior to alienation could not defeat a registered title so obtained.* The apex court had so concluded, as could be seen in *TR Nyutan*'s case that the remedy open to the aggrieved party lies in damages by way of compensation, under s 197 of the SLC.
>
> [125] In this regard, considering the variation in the definition of the words 'subject to' as discussed above, *we are of the considered opinion that the phrase 'subject to this Code' in s 132(1) does not make the NCR as the qualifying factor to indefeasibility other than what is expressly stated therein — the 'fraud factor'.* (Emphasis added.)

[57] Therefore, we are of the considered opinion based on the aforesaid decisions of the apex courts, the indefeasibility of title of SESCO over the said lot prevailed over any NCR claim by the respondents. SESCO became the registered owner of the said lot even before the respondents can establish their NCR, which was eventually dismissed. In the absence of vitiating factors under s 132 of the Sarawak Land Code, SESCO's registered interest could not be defeated by the respondent's NCR claim. As such, we find that the learned JC is plainly wrong as he had failed to considered the indefeasibility of SESCO's title to the said lot.

[58] The learned JC was plainly wrong when he failed to conclude that based on established authorities, the proper remedy for the infringement of NCR (if any) as a result of the alienation of the said lot to SESCO is an award of damages and not a declaration to nullify the title issued to SESCO.

[59] In *TR Nyutan*, the Federal Court held that the Legislature of Sarawak has prescribed a statutory remedy for any person, who is deprived of any land but barred from bringing an action either against the registered proprietor on account of indefeasibility of title, or against the government for the recovery of that land, to seek compensation from the government, under s 197 of the Sarawak Land Code. The proper remedy for infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment, was an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.

CONCLUSION

[60] For the aforesaid reasons, we find merits in the appeal and the appeal is allowed with costs. The decision of the learned JC is set aside.

Appeal allowed with costs; decision of learned JC set aside.

Reported by Dzulqarnain Ab Fatar